

**The Argus-Press Company and Joint Council #43,
International Brotherhood of Teamsters, AFL–
CIO, Petitioner.** Case 7–RC–19790

May 13, 1993

**DECISION AND CERTIFICATION OF
REPRESENTATIVE**

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT
AND RAUDABAUGH

The National Labor Relations Board, by a three-member panel, has considered objections to an election held April 28, 1992, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows six for and three against the Petitioner, with one challenged ballot, an insufficient number to affect the results.

The Board has reviewed the record in light of the Employer's exceptions and brief, and has adopted the hearing officer's recommendation to overrule the Employer's objections and to issue a certification of representative. As explained below, we affirm the hearing officer's recommendation to overrule the Employer's objection that the election was not conducted in an appropriate manner as a result of actions attributable to the Board agent handling the election. Specifically, the Employer contends that insufficient notice was provided unit employees of the location of the polling place. The Employer, however, does not assert that anyone failed to appear at the polls within the stipulated voting period because of the Board agent's handling of the election.

The parties were afforded a full opportunity to present evidence on this issue. It is undisputed that at the scheduled time for closing the polls, the Board agent announced to the observers that the polls were to remain open owing to the late arrival of the initial voters. Three persons, Brook Reica, Judy Schiakas, and Jim Fivecoat, thereafter arrived to vote, and the Board agent did not cause these ballots to be challenged on the basis of their untimeliness. The ballots of Reica and Schiakas were cast and counted, and the ballot of Fivecoat was challenged for reasons unrelated to his late arrival, i.e., that he was a supervisor. The evidence thus indicates that the Board agent may have allowed two voters to cast unchallenged ballots after the polls should have been closed. The tally of ballots, however, indicates that six votes were cast for the Petitioner, and three were cast against it. Even assuming, arguendo, that these two ballots were cast for the Petitioner and that they should not have been counted, the Petitioner would still have retained a 4-to-3 majority of the remaining valid ballots cast.¹ In light of this evi-

¹ Had they been cast against the Petitioner, the margin of voting support for the Petitioner would have been even greater.

dence, we find that the Employer failed to establish that the purported Board agent misconduct affected the results of the election. Accordingly, in adopting the hearing officer's conclusion that no objectionable conduct occurred, we find it unnecessary to resolve the propriety of the Board agent's handling of the election.

Contrary to our colleague, we find no basis for finding that Fivecoat could have been late for reasons attributable to the Board agent's conduct at the same time that Reica and Schiakas were late for some other reason, and that Fivecoat's ballot could therefore have been determinative. First, after a full hearing on the effect of the Board agent's conduct on the election, there is no specific evidence why any individual voter was late. Indeed, our dissenting colleague concedes this, but nevertheless contends that we should speculate that Fivecoat could have been late for reasons unrelated to the reason for the other two voters' lateness. There is no basis in the record for treating these voters and their ballots in such a disparate manner. Second, given the "unusual circumstances" test enunciated in *Monte Vista Disposal Co.*, 307 NLRB 531 (1992), a party who seeks to have a late-cast ballot counted has the obligation to establish the affirmative basis for disregarding the legitimate end of the voting period. As noted above, our colleague concedes that this justification has not been established, but contends that we may substitute speculation for evidence.² Consequently, we find no basis for distinguishing between the treatment of any of the three ballots cast after the close of the stipulated voting period. Accordingly, we find no merit in the Employer's objection.

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for Joint Council #43, International Brotherhood of Teamsters, AFL–CIO and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time press department and composing room employees, including pressmen, layout department employees and camera department employees employed by the Employer at its facility in Owosso, Michigan; but excluding all circulation department employees, news department employees, advertising department employees, office clerical employees, management employees, guards, and supervisors as defined in the Act.

² As the Board agent's conduct of the election solely implicates whether ballots cast late should have been counted, we find no basis for reversing the normal *Monte Vista* burden as to who has the responsibility for explaining why ballots were cast outside the normal polling time.

MEMBER RAUDBAUGH, dissenting.

The instant case involves alleged misconduct by a Board agent in the handling of an election. The allegations are that the Board agent: (1) failed to ensure that employees were aware of the location of the election; (2) failed to close the polls at the stipulated time; (3) allowed three persons to vote after the stipulated time for closing.¹

My colleagues refuse to pass on whether the Board agent engaged in misconduct and whether the election should be set aside. In their view, even if all three persons should have been excluded from voting, the Petitioner would still have won the election.

I disagree. As noted above, there were three individuals who arrived at the polls after the originally designated closing time. The record does not reflect the reasons for their tardiness. It may be that some of them arrived late because of the apparent confusion as to the location of the polling place, while others arrived late for unrelated reasons. The difference could be critical. For example, if employees Reica and Schiakas were late for unrelated reasons, and if they

voted for the Petitioner, the tally would be four to three in favor of Petitioner. If Fivecoat were late because of the confusion, his challenged ballot would be determinative.

Thus, in my view, the Board should resolve the issue of whether there was misconduct by the Board agent. My colleagues refuse to resolve that issue. They argue that the evidence does not establish that the alleged misconduct had an impact on the election. I believe that they have applied an erroneous standard of proof. If there was misconduct by the Board agent, the election must be set aside, unless it can be shown that it is highly improbable or virtually impossible that the misconduct affected the election.² Accordingly, I would first determine whether misconduct occurred. If it did, I would then determine whether it has been shown that it is highly improbable or virtually impossible that such misconduct affected the election.³

Accordingly, without passing on the issues raised by this case, I do not agree that those issues can be avoided on arithmetic grounds.

¹The three persons were Fivecoat, Reica, and Schiakas. Fivecoat was challenged on the ground that he was a supervisor. Reica and Schiakas were not challenged and they cast ballots. The election results showed six votes for Petitioner, three against Petitioner, and one challenged ballot.

²*Peoples Drug Stores*, 202 NLRB 1145 (1973); *Polymer*, 174 NLRB 282 (1969); *F. N. Joslin Co.*, 79 NLRB 1048 (1948).

³Because this case involves alleged misconduct by a Board agent, the above principles, rather than those set forth in *Monte Vista Disposal Co.*, 307 NLRB 531 (1992), are applicable.